

**STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
INSURANCE DIVISION**

In the Matter of **ALG Auto Services, Inc.**) **FINAL ORDER**
) Case No. INS 07-08-018

The Director of the Oregon Department of Consumer and Business Services (director), commenced this administrative proceeding, at the request of ALG Auto Services, Inc. (employer), pursuant to Oregon Revised Statutes (ORS) 737.318(3)(d) and ORS 737.505(4), and Oregon Administrative Rules (OAR) 836-043-0101 *et seq.*, to review a workers' compensation insurance final premium audit billing (billing) issued by SAIF Corporation to the employer.

History of the Proceeding

On 5/18/07, the employer received from the insurer a billing dated 5/16/07 for the audit period from 10/25/05 to 11/1/06. The billing informed the employer that it may request a hearing by sending to the director a written request for a hearing so that the director receives the request within 60 days after the employer received the billing. See ORS 737.318(3)(d), ORS 737.505(4), and OAR 836-043-0170(1).

On 7/16/07, the director timely received from the employer a letter dated 7/12/07 requesting a hearing to review the billing.

On 7/20/07, the director mailed to the employer a letter and a petition form. The letter informed the employer that it must complete the form and return it to the director so that the director receives it within 60 days after the director received the request for a hearing, otherwise the director will dismiss the employer's request for a hearing. See OAR 836-043-0170(2)-(3) & (9).

On 8/16/07, the director timely received from the employer the completed petition.

On 8/20/07, the director referred the request to the Office of Administrative Hearings (OAH).

On 8/29/07, OAH scheduled a hearing to be conducted on 11/26/07.

On 10/24/07, OAH rescheduled a hearing to be conducted on 2/12/08.

On 2/13/08, OAH rescheduled a hearing to be conducted on 4/17/08.

On 4/17/08, OAH conducted a hearing. The hearing was conducted by Rick Barber, an administrative law judge of OAH. The employer appeared and was represented at the hearing by Charles Dalby, as the employer's authorized representative pursuant to OAR 836-005-0112 and OAR 137-003-0555. The employer called Gilbert Torres and David Campbell as its witnesses. The employer offered Exhibits B1 to B5 as its documentary evidence all of which were admitted into the record. The insurer appeared and was represented at the hearing by Ethan R. Hasenstein, an Assistant Attorney General assigned to represent the insurer, The insurer called DeAnne Hoyt and Dave Murrieta as its witnesses. The insurer offered Exhibits A1 to A25 as its documentary evidence all of which were admitted into the record.

On 6/4/08, OAH issued a proposed order. The primary issue was whether the insurer correctly billed the employer for workers' compensation insurance premium based on compensation paid by the employer to certain workers, called "techs," for repairing cosmetic damage to the exterior and interior of new and used automobiles owned by automobile dealers and located at the dealers' lots during the audit period. The employer argued that the "techs" were not "workers" as defined in ORS 656.005(30) but were "subcontractors." The order found that the "techs" were "workers" because they provided labor for the employer and the employer paid them for their labor, and were subject to the direction and control of the employer while performing such labor. The order found that the "techs" were subject to the direction and control of the employer because, after applying both the judicially created "right to control" and "nature of the work" tests, the employer actually controlled some, and had the right to control other, aspects of how the "techs" performed their labor when making the repairs, and their labor for the employer

was an essential and regular part of the employer's business.¹ The order concluded that the billing was correct and recommended that the director affirm the billing. The proposed order informed the employer and insurer that they could file with the director written exceptions to the proposed order within 30 days after the proposed order was served on the employer and insurer.

The director did not receive from the parties any exceptions to the proposed order.

Therefore, the director now makes the following final decision in this proceeding.

Findings of Fact, Conclusions of Law and Opinion

The director adopts, and incorporates herein by this reference, the findings of fact, conclusions of law, and reasoning of proposed order as the findings of fact, conclusions of law, and reasoning of this final order.

Order

The billing is affirmed.

Notice of Right to Judicial Review

A party has the right to judicial review of this order pursuant to ORS 183.480 and ORS 183.482. A party may request judicial review by sending a petition for judicial review to the Oregon Court of Appeals. The court must receive the petition within 60 days from the date this order was served on the party. If the order was personally delivered to a party, then the date of service is the date the party

¹ In *Woody v. Waibel*, 276 Or 189 (1976), the Oregon Supreme Court established a "right to control" test and a "nature of the work" test to determine whether a person is a "worker" under Oregon's workers' compensation law. In *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002), the court noted that the "[f]actors relevant to the right to control test have included, for example, whether the employer retains the right to control the details of the method of performance, the extent of the employer's control over work schedules, whether the employer has power to discharge the person without liability for breach of contract, and payment of wages. *S-W Floor Cover Shop v. Nat'l. Council on Comp. Ins.*, 318 Or 614, 622, 872 P.2d 1 (1994)." *Id.* at 618 n 1. The court also noted that "[f]actors relevant to the 'nature of the work' test have included considerations such as whether the work done is an integral part of the employer's regular business and whether the individual, in relation to the employer's business, is in a business or profession of his or her own. See *Woody v. Waibel*, 276 Or 189, 197-98, 554 P.2d 492 (1976)." *Id.* at 619 n 2. The court explained "when an employer has the right to control a claimant's performance *in some respects but not others*, 'it is essential that we consider the factors which make up the 'nature of work' test' in deciding whether the control that employer retains makes the relationship one of master and servant. *Woody*, 276 Or at 196-97." *Id.* at 627 (emphasis added).

received the order. If the order was mailed to a party, then the date of service is the date the order was mailed to the party, not the date the party received the order. If a party files a petition, the party is requested to also send a copy of the petition to the Insurance Division.

Dated _____

Scott J. Kipper
Administrator
Insurance Division
Department of Consumer and Business Services

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